No. 02-1458

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

In The

Supreme Court of the United States

LEONARD J. DAZET, JR., JAMES ANTHONY McDANIEL, DEMICO PERKINS, and all those similarly situated,

Petitioners,

v.

M. J. FOSTER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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RESPONDENTS IN THIS BRIEF

The following Sheriffs in Louisiana (name of Parish in parentheses): Kenneth Goss (Acadia), Hal Turner (Allen), Jeff Wiley (Ascension), M. Bolivar Bishop (Beauregard), James R. Savoie (Cameron), Ronnie Book (Catahoula), Kenneth L. Volentine (Claiborne), Randy Maxwell (Concordia), Rodney Arbuckle (De Soto), Mark W. Shumate (East Carroll), Wayne Morein (Evangeline), Steve Pylant (Franklin), Leonard Hataway (Grant), Sidney Hebert (Iberia), Harry Lee (Jefferson), Richard Edwards, Jr. (Jefferson Davis), Craig Webre (Lafourche), Carol Smith (La Salle), Wayne Houck (Lincoln Parish), Larry Cox (Madison), Danny McGrew (Morehouse), Victor Jones (Natchitoches), Charles C. Foti, Jr. (Orleans), I. F. Hingle (Plaquemines), Paul Raymond Smith (Pointe Coupee), William Earl Hilton (Rapides), Charles McDonald (Richland), Guffey L. Pattison (Sabine), Jack A. Stephens (St. Bernard), Ronald Ficklin (St. Helena), Wayne L. Jones (St. John the Baptist), Howard Zerangue (St. Landry), Charles Fuselier (St. Martin), David A. Naquin (St. Mary), Rodney Strain (St. Tammany), Edward Layrisson (Tangipahoa), Ricky Jones (Tensas), Jerry J. Larpenter (Terrebonne), Bob Buckley (Union), Ray Lemaire (Vermillion), Duane Blair (Washington), Larkin Riser (Webster), Randall J. Andre (West Baton Rouge), Gary K. Bennett (West Carroll), Austin Daniel (West Feliciana), James E. Jordan (Winn), Mike Waguespack (Assumption), John E. Ballance (Bienville), Beth O. Lundy (Calcasieu), Steven E. May (Caldwell), Talmadge Bunch (East Feliciana), Brent Allain (Iberville), Richard Johnson (Jackson), Richard E. Fewell, Sr. (Ouachita), Sam Craft (Vernon)

TABLE OF CONTENTS

Page

RESPONDENTS IN THIS BRIEF i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. The fees at issue are not "court costs" but reasonable administrative charges which implicate no constitutional protection 3

II. The fees at issue do not impinge on any fundamental right, "limited" or otherwise 4

III. The Louisiana Supreme Court's sole opinion concerning the statutes at issue neither requires nor merits acceptance by a federal court deciding a federal question 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Bell v. Wolfish, 441 U.S. 520 (1979) 4

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) 6

Doerr v. Mobil Oil Corp., 774 So.2d 119 (La. 2000) 7

Enlow v. Tishomingo County, Mississippi, 45 F.3d 885 (5th Cir. 1995) 3

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 4

Marbury v. Madison, 5 U.S. 137 (1803) 5

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 6

In re Orso, 283 F.3d 686 (5th Cir. 2000) 6

Schilb v. Kuebel, 404 U.S. 357 (1975) 3, 4

State v. Gomez, 778 So.2d 549 (La. 2001) 6

State ex rel. Grosch v. Echezabal, 58 So.2d 398 (1952) 6

State ex rel. Leche v. Waggner, 8 So. 209 (1890) 5, 6

Taylor v. County of Peoria, 727 N.E. 2d 700 (Ill. App. 3d Dist. 2000) 5

Transcontinental Gas Pipe Line Corp. v. Transportation Insurance Co., 953 F.2d 985 (5th Cir. 1992) 7

Winstead v. Ed's Live Catfish and Seafood, 554 So.2d 1237 (La. App. 1989) 7

STATEMENT OF THE CASE

Petitioners' summaries of the three bail bond release statutes at issue and of the procedural history of these consolidated class actions are substantially correct and require no elaboration. However, their recitation of the material facts which became the basis for summary judgment is misleading by omission.

The factual record in this case is composed of stipulations concerning each defendant's procedures in enforcing the relevant fee statute under which it operates. These six stipulations are found in the Appendix to the Petition at pp. A-83 through A-107.[1] Despite the enormous number of potential claimants,[2] the record is devoid of any evidence that:

a) any arrestee was prevented from (or even delayed in) securing release on bond by collection of the fee;

b) any arrestee who was acquitted or whose charges were dismissed ever made request for return of his fee, much less was refused it; or

c) any sheriff ever applied the release fee statute otherwise than uniformly to all categories of arrestees in his Parish.

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[1] The Appendix to the Petition is cited herein as "App. ___". The Petition itself is cited as "Pet. ___".

[2] Petitioners assert that "perhaps hundreds of thousands of fees" have been collected from class members (Pet. at 6).

Although these stipulations also show that different sheriffs interpret and apply the statutes differently, all that evidence proves is that a number of sheriffs are not collecting the entire amount to which they are statutorily entitled (*i.e.*, one fee per bond per charge).

Throughout their Brief, petitioners consistently refer to the bail bond release fees as "court costs". While it is true that the statutory authority for collection of these fees is found in statutes which also provide for collection of a variety of other charges, the fees are (as recognized by both courts below) nominal administrative charges related to the operation of the bail bond system. The name given to the fees is of no constitutional significance; the charges are what they are. To conclude otherwise would lead to the bizarre result that a legislature could redeem an unconstitutional statute simply by renaming or relocating it.

REASONS FOR DENYING THE WRIT

For their writ grant considerations, petitioners urge that the Fifth Circuit "misstated" the rule of an opinion of this Court and that its opinion actually "conflicts" with a decision of the Louisiana Supreme Court. (Pet. at 8).[3] The first contention is simply wrong; the second contention, even if arguably correct, is not a sufficient basis for this Court to exercise its discretionary jurisdiction. The skimpy record in this case is a poor foundation upon which to expect this Court to address issues of significant legal, fiscal and political import concerning the powers of the

[3] No conflicting opinion of any other circuit is suggested.

various states to provide for the funding and operation of their criminal justice systems.

I. The fees at issue are not "court costs" but reasonable administrative charges which implicate no constitutional protection.

Petitioners' argument that the release fees at issue constitute prohibited "court costs" has already been rejected twice, and rightly so. The Fifth Circuit concluded they were instead only constitutionally permissible "administrative charges related to the functioning of the bail-bond system. . . . " 318 F.3d at 647.

In so holding, the Fifth Circuit reaffirmed its prior opinion in *Enlow v. Tishomingo County, Mississippi*, 45 F.3d 885 (5th Cir. 1995), which dismissed similar challenges to a practically identical Mississippi statute. In turn, both its opinion herein and its opinion in *Enlow* relied upon the decision of this Court in *Schilb v. Kuebel*, 404 U.S. 357 (1975).

Schilb is not factually on all fours with the present controversy, but its reasoning supports the validity of the challenged statutes. *Schilb* questioned an Illinois law which provided for a nominal non-refundable fee for participation in a new, court-administered bond release program. Rejecting claims of constitutional invalidity under both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment, this Court held:

> But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with

> the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion. The applicable measure, therefore, must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis.
>
> 404 U.S. at 365 (citations omitted).

Distinguishing its own prior opinion in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the *Schilb* Court also concluded that the non-refundable fee at issue was neither a court cost nor a cost of prosecution. 404 U.S. at 370.

II. The fees at issue do not impinge on any fundamental right, "limited" or otherwise.

As shown above, this Court has already decided in *Schilb* that imposition of a non-refundable charge for accepting bail does not impinge on a fundamental right guaranteed by any specific provision of the Constitution. Thus, the validity of such a charge must be evaluated only through the Due Process Clause of the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

Bell specifically rejected a compelling necessity standard to justify governmental action. 441 U.S. at 534. Rather, it held that governmental action would pass constitutional scrutiny if the conduct was reasonably related to a legitimate governmental objective. *Id.* at 538-39. The reasonable governmental objective of the nominal fees at issue here is obvious: to defray the costs of

operating the bail bond system in which petitioners participated.[4] The charges are modest on their face, and the record is devoid of any evidence that they represent a windfall to their recipients.

III. The Louisiana Supreme Court's sole opinion concerning the statutes at issue neither requires nor merits acceptance by a federal court deciding a federal question.

Petitioners seem to believe that the courts below declined to adopt the opinion of the Louisiana Supreme Court in *State ex rel. Leche v. Waggner*, 8 So. 209 (1890) as the controlling rule of decision simply because it is an old case. *Waggner* is certainly old, but that is not the point; *Marbury v. Madison*, 5 U.S. 137 (1803) is considerably older.

There are several fundamental problems with petitioners' reliance on *Waggner*. First, although *Waggner* (which involved removal of a sheriff from office on numerous asserted grounds of malfeasance) stated that collection of a statutorily mandated bail bond release fee was the equivalent of extortion, the opinion never states whether this conclusion is grounded in Louisiana statutory law, in the Louisiana Constitution or in the United States Constitution.[5] No subsequent opinion of any Louisiana court

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[4] It is worthwhile to note that Illinois, the birthplace of "bail reform" law, now exacts a fee akin to the statutes challenged herein. In at least one county, that fee is $15.00. *See Taylor v. County of Peoria*, 727 N.E. 2d 700 (Ill. App. 3d Dist. 2000).

[5] The district court's jurisdiction in the present case was based solely on federal questions under the Fourth, Eighth and Fourteenth

(Continued on following page)

elaborates on the basis for *Waggner's* holding or even cites it. In fact, over sixty years after its opinion in *Waggner*, the Louisiana Supreme Court again considered one of the statutes at issue in a different context. In *State ex rel. Grosch v. Echezabal*, 58 So.2d 398 (1952), the criminal sheriff of Orleans Parish and the judges of its criminal district court contested which of them was the proper party to receive the release fee, yet the court never cited its prior opinion in *Waggner* nor otherwise suggested the fee was not collectible.

Second, post-*Waggner* legislatures have repeatedly amended and reenacted the bail bond release statutes at issue without significant substantive change. Under well settled Louisiana rules of statutory interpretation, this action represents permissible legislative action to overrule its holding. *State v. Gomez*, 778 So.2d 549, 554 (La. 2001).

Third, even if *Waggner* can wildly be construed to have announced a principle of federal constitutional law, it would not be binding on any federal court later addressing the same question. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000), citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

Fourth, Louisiana is unique among the states as a hybrid civil law/common law jurisdiction. Under its own rules of decision, even the most definitive opinion of its supreme court has no *stare decises* effect as true precedent. "The supreme expression of legislative will in Louisiana is of course the codes and statutes." *In re Orso*, 283

Amendments; supplemental jurisdiction over any related claims arising under state law was never asserted.

F.3d 686, 695 (5th Cir. 2000), quoting *Winstead v. Ed's Live Catfish and Seafood*, 554 So.2d 1237, 1242 (La. App. 1989). In cases involving application of Louisiana laws, a federal court is only guided, not bound, by decisions of Louisiana courts. *Transcontinental Gas Pipe Line Corp. v. Transportation Insurance Co.*, 953 F.2d 985, 988 (5th Cir. 1992). The Louisiana Supreme Court itself recognizes this principle of construction. *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 128 (La. 2000).[6]

CONCLUSION

Petitioners' argument for bail bond "reform" is properly directed only to the Louisiana Legislature and to the citizens of Louisiana who would be responsible for subsidizing its implementation. The Petition should be denied.

Respectfully submitted,

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[6] *Doerr* also recognizes that Louisiana's analogue to *stare decisis* is *jurisprudence constante*, in which persuasive authority arises only from a long line of consistent rulings. *Id.*